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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.414 OF 2007
WITH
WRIT PETITION NO.1132 OF 2007

M/s.China Gate Restaurant
Private Limited ... Petitioners

versus

Kisan D. Badei ... Respondent

Mr.V.P.Vaidya a/w Piyush Shah for petitioners.
Ms.Gayatri Singh a/w Neel Helekar for respondent.

CORAM : A.M.KHANWILKAR, J.
DATE : 28th November 2007

PC :

1. Heard counsel for the parties on the question of granting interim relief during the pendency of the writ petition as prayed by the petitioner as also the reliefs claimed by the respondent workman in the Notice of Motion No.414 of 2007. As the argument for considering both these reliefs is overlapping, the same is disposed off by the common order.

2. The writ petition arises from an order passed by the Presiding Officer-I, Labour Court, Mumbai

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dated 28th November 2006. For considering the points in issue, I think it apposite to reproduce the Award as passed by the Presiding Officer-I, Labour Court, Mumbai which is subject matter of the challenge in the writ petition. The same reads thus :-

AWARD

> i) The reference is allowed.
>
> ii) The 2nd party is entitled to get reinstatement with full back wages and continuity of service w.e.f. 20.6.2002 with consequential benefits. The amount deposited by the 1st party Rs.3000/- per month as per the order of the court shall be adjusted in the back wages payable to the 2nd party.
>
> iii) The 1st party in case do not ant to reinstate the 1st party, is at liberty to pay full back wages from 20.6.2002 till today with consequential benefits and is at liberty to pay compensation of Rs.2,50,000/- (Two lac fifty thousand only) instead of reinstatement. The amount paid to the 2nd party during the pendency of the said reference shall be adjusted in the payment of back wages."

3. It is not in dispute that the writ petition is already admitted on 28th June 2007. By the same order the petitioner was permitted to deposit an amount of Rs.2,50,000/- (Rs.Two lakh fifty thousand only) in this Court within four weeks. The petitioner has already complied with

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that direction in time.

4. The question is whether the petitioner is entitled for absolute stay of operation of the impugned award. In my opinion, there is no question of granting absolute stay of the operation of the impugned award as prayed by the petitioner, muchless in relation to the order of reinstatement.

5. The next question is, the nature of interim relief to be granted in the writ petition. According to the petitioner, even if the petitioner fails in the pending writ petition, the petitioner would at best prefer to avail of the alternate option provided to the petitioner in terms of clause (iii) of the award, of paying compensation in lieu of reinstatement of the respondent workman.

6. As per clause (iii) of the award, the petitioner is obliged to pay full back wages from 20th June 2002 till the date of the award to the respondent workman and in addition, compensation of Rs.2.50 lakh in lieu of reinstatement.

7. Insofar as the order of reinstatement is concerned, for the reasons which have weighed

with the Labour Court, in my opinion, has been rightly passed by the Labour Court. This is obviously a prima facie view which I am expressing for consideration of the present application. In terms of that relief, the respondent would also be additionally entitled to back wages as ordered by the Labour Court. May be the petitioner may succeed in persuading the Court at the hearing of the petition that the respondent in the fact situation of the present case, is not entitled for full back wages but only part thereof or for that matter no back wages at all. However, it is now clear that the petitioner is determined not to reinstate the respondent. If that is so, the petitioner would in any case be liable to pay the compensation in lieu of reinstatement as awarded by the Labour Court. The petitioner has already deposited that amount in this Court.

8. The next question is, whether the petitioner should be granted stay of operation of the direction to pay full back wages, as directed by the Labour Court under order dated 28th November 2006. The counsel for the petitioner has placed reliance on the decision of the Apex Court in the case of General Manager, Haryana Roadways Vs.

Rudhan Singh reported in (2005)5-SCC-591 to contend that awarding full back wages is not a matter of course but will have to be considered keeping in mind several factors expounded by the Apex Court. In the present case, the tenure of service of the respondent, contends counsel for the petitioner, was hardly two years before his services came to be terminated. For that reason, the respondent in no case will be entitled to an order of full back wages. Significantly, the reference proceedings remained pending before the Labour Court till 28th November 2006. There is nothing on record to show that the respondent was, in any way, responsible for such long pendency of the proceedings. The respondent was always ready and willing to work. In fact, by way of interim order during the pendency of the proceedings in the Lower Court, the respondent was ordered to be taken back in service. However, according to the respondent, even that direction was not complied by the management. It is not necessary to address those aspects for the present for considering this application. Suffice it to observe that even if the petitioner, by way of interim relief, is not required to pay the entire back wages from 20th June 2002 till the date of the award, will have

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to deposit 50% of the said amount in this Court, which amount be deposited within four weeks from today. On such deposit being made, the amount be invested by the Registrar (O.S.)/Prothonotary and Senior Master in appropriate fixed deposit scheme of a nationalised bank so as to get maximum returns thereon, which will be subject to the outcome of the petition.

9. Insofar as the amount already deposited by the petitioner being a sum of Rs.2.50 lakh is concerned, the same has been specified in lieu of reinstatement. The respondent would be free to withdraw the said amount on furnishing appropriate commensurate security and also giving undertaking that as and when any direction is issued by the Court the entire or part of that amount as the case may be, will be brought back and deposited in this Court within specified time. The above directions would meet the ends of justice and dispose of the prayer for interim relief prayed on behalf of the petitioner.

10. Insofar as reliefs claimed on behalf of respondent in the Notice of Motion are concerned, the same read thus :-

"(a) That pending the hearing and final disposal of petition, the Petitioner may be directed by an order and mandatory injunction of this Honourable Court to pay to the Respondent, the entire arrears of back wages payable to the Respondent in terms and award dated 28/11/2006 of the Labour Court, Bombay in reference (IDA) No.287 of 2003.

(b) That pending the hearing and final disposal of the petition, the petitioner may be directed to pay to the Respondent monthly wages from the date of the award till the Respondent in reinstated in service, in terms of the Award dated 28/11/2006 of the Labour Court, Bombay in Reference (IDA) No.287 of 2003.

(c) That the Prothonotary and Senior Master, High Court, Bombay may be directed to pay to the Respondent, the amount deposited by the petitioner in this Honourable Court, pursuant to the order dated 28/06/2007.

(d) For ad-interim orders in terms of prayers (a), (b) and (c).

(e) For costs of the Notice of Motion and of the Respondent.

(f) For such further and other reliefs orders and directions as the nature and circumstances of the case may requires or justify or as this Honourable Court may deem just and proper."

11. Insofar as relief in terms of prayer clause (a) is concerned, that is answered in the earlier part of this order as the petitioner has been ordered to deposit only 50% of the back wages in terms of award dated 28th November 2006 which amount will be invested in fixed deposit scheme and remain pending till the disposal of the writ

petition.

12. Insofar as prayer clause (b) is concerned, that is founded on the right flowing from section 17-B of the Industrial Disputes Act, 1947. This relief, however, is opposed by the counsel for the petitioner on the ground that the petitioner has already complied with the requirement in terms of the award to exercise the alternate option, so as not to reinstate the respondent. According to the petitioner, in fact, the award, as passed, is not an order of reinstatement as such, but giving option to the petitioner not to reinstate the respondent and instead pay the compensation to the respondent in lieu of reinstatement. In such a case, Section 17-B of the Act will have no application.

13. This argument, however, is countered by the counsel for the respondent workman on the ground that the petitioner has not expressly exercised the option provided under clause (iii) of the award. The petitioner has merely chosen to deposit a sum of Rs.2.50 lakh in this Court. That is not sufficient to absolve the petitioner. In absence thereof, the order of reinstatement in terms of clause (ii) of the award would get

activated and would subsist to operate till the same is complied by the petitioner. In such a case, by virtue of Section 17-B of the Act, the petitioner would be liable to compensate the respondent workman by paying his last drawn salary on regular basis until the disposal of the writ petition. In support of this submission, reliance is placed on the decision of the Apex Court in case of Dena Bank Vs. Kirtikumar T. Patel reported in (1999)2-SCC-106 in particular paragraphs 6 and 23.

14. Going by the direction issued by the Labour Court, there is no doubt that the award in the first place declares that the respondent workman is entitled for an order of reinstatement with full back wages. Indeed, the Labour Court has given option to the employer to pay compensation in lieu of reinstatement in terms of clause (iii) of the award. In the present case, the petitioner has not acted upon that part of the award, but has chosen to question the justness and appropriateness of the entire award by way of writ petition. The fact that the petitioner has deposited a sum of Rs.2.50 lakh in this Court, cannot extricate the petitioner from the direction contained in clause (ii) of the award

as such. Moreover, clause (iii) of the award not only requires the petitioner to pay the compensation of Rs.2.50 lakh in lieu of reinstatement but also requires the petitioner to pay full back wages from 20th June 2002 till the date of award i.e. 28th November 2006. That is a composite direction contained in clause (iii) of the award. Thus understood, it is not possible to take a view that there is no order of reinstatement in the fact situation of the present case so as to extricate the petitioner from the statutory obligation of Section 17-B of the Act. As mentioned earlier, the petitioner has not expressly chosen to avail of the option provided in clause (iii) of the award as such. In that situation, the order of reinstatement in terms of clause (ii) of the award shall operate for which reason the respondent workman would be entitled to avail of the remedy under section 17-B of the Act.

15. Insofar as relief to be granted under section 17-B of the Act is concerned, the objection of the petitioner is that, in the application, there is no pleading that the respondent was not employed any where at the relevant time on or after the award was passed on

28th November 2006. The counsel for the respondent, on the other hand, has invited my attention to the averment in paragraph 6 of the affidavit in support of the motion where the respondent has categorically stated that he has no source of income to maintain himself. That position has not been countered except the bare denial of the petitioner. The stand taken by the respondent implicitly means that he is not employed elsewhere after the date of award and filing of the motion in this Court. The counsel for the respondent, on instructions of the respondent who is present in the Court, states that the respondent is willing to enter the dock and reiterate and also explain the position stated in paragraph 6 of the affidavit. The respondent has appeared before the Court and has stated that he is not employed any where else as of now or from 28th November 2006. It will be open to the respondent to place that fact on affidavit in this Court by tomorrow. It is not the case of the petitioner that there is evidence to suggest that the respondent was in fact employed elsewhere during the relevant period. In my opinion, therefore, the respondent would be entitled for relief in terms of prayer clause (b) of the motion. That, however, will be subject to

respondent not availing the option of withdrawing the amount of Rs.2.50 lakh already deposited by the petitioner in this Court. In other words, if the respondent prefers to withdraw the said amount of Rs.2.50 lakh which is towards compensation in lieu of order of reinstatement, then the question of respondent being entitled to get relief in terms of the statutory right flowing from Section 17-B of the Act does not arise. For, in that case, it will be assumed that the respondent has accepted the stipulation in clause (iii) of the award of not being reinstated in service. In the event the respondent prefers not to withdraw the said amount of Rs.2.50 lakh within four weeks from today, the Registrar (O.S.)/Prothonotary and Senior Master shall invest even that amount in appropriate fixed deposit scheme in a Nationalised Bank to avail of best returns thereon. That amount shall remain invested till the disposal of the Writ Petition, to be disbursed subject to such orders as would be passed after hearing of the writ petition.

16. Insofar as prayer clause (c) of the motion is concerned, appropriate directions are already given to the Registrar (O.S.)/Prothonotary and

Senior Master in relation to the amount to be deposited by the petitioner towards back wages, no further direction in that behalf is necessary.

17. Accordingly, the Motion filed by the workman would succeed only in terms of prayer clause (b) on the aforesaid condition.

18. This order would dispose of the prayer for interim relief during pendency of the writ petition as well as reliefs prayed in the Motion on the above terms. Needless to observe that the above arrangement is only an interim provision during the pendency of writ petition and is not an expression of final opinion on the merits of the controversy in the pending writ petition.

19. At this stage the counsel for the petitioner seeks stay of operation of this order so as to enable the petitioner to carry the matter in appeal. Although this prayer is opposed, in my opinion, it will be appropriate to defer the operation of directions issued in this order for a period of two weeks from today. Ordered accordingly.

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(A.M.KHANWILKAR, J.)

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Transcription of Judgement
submitted on : 28th November 2007

For approval :

THE HON'BLE MR.JUSTICE A.M.KHANWILKAR)

To be referred to the reporter or not ?

To be shown to the reporters of the
local news-papers or not?